STATE OF MICHIGAN

COURT OF APPEALS

SHARLENE TOLLIVER,

Plaintiff-Appellant,

v

WILLIAM VANDENBELT, M.D., BAY CITY O.G., P.C., and BAY MEDICAL CENTER,

Defendants-Appellees.

UNPUBLISHED
June 19, 2003

No. 237116
Bay Circuit Court
LC No. 01-003094-NH

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Plaintiff appeals from and we affirm the trial court's order granting summary disposition to defendants in this medical malpractice action.

Plaintiff contends that the trial court erred as a matter of law in its interpretation of the interaction between the tolling provision of MCL 600.5856(d) and the notice of intent to sue provision of MCL 600.2912b. MCL 600.2912b establishes a non-suit period lasting up to 182 days that is commenced by the filing of a written notice of intent to file a lawsuit. MCL 600.5856(d)[1] provides that if the notice is filed less than 182 days before the expiration of the two-year period of limitation, MCL 600.5805(5), the statute of limitations is tolled for a period equal to the number of days remaining in the notice period.

Our Supreme Court, in *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000), has explained that the first clause of § 5856(d)

> sets forth the circumstances in which [§ 5856(d)] is applicable. *Thus, if the interval when a potential plaintiff is not allowed to sue ends before the limitation period ends (i.e., if notice is given more than one hundred eighty-two days before*

[1] MCL 600.5856(d) specifically provides that the statutes of limitations or repose are tolled:

> If, during the applicable notice period under section 2912b, a claim would be barred by the statute of limitations or repose, for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is given in compliance with section 2912b.

> *the end of the limitation period), then [§ 5856(d)] is of no consequence.* In that circumstance, the limitation period is unaffected by the fact that, during that period, there occurs an interval when a potential plaintiff cannot file suit.
>
> If, however, the interval when a potential plaintiff is not allowed to file suit would end after the expiration of the limitation period (i.e., if notice is given one hundred eighty-two days or less before the end of the limitation period), then [§ 5856(d)] applies. In that instance, the limitation period is tolled. [Emphasis supplied.]

The statement in *Omelenchuk* is consistent with the plain language of § 5856(d), which provides tolling protection *if* the statute of limitations expires during the notice period. Plaintiff contends that the emphasized portion of *Omelenchuk* is merely dicta and, therefore, this Court is free to ignore it and interpret the statute anew. We disagree. Parts of judicial decisions may be authoritative though not decisive:

> "When a court of last resort intentionally takes up, discusses and decides a question *germane* to, though not necessarily decisive of, the controversy, such decision is not a *dictum* but is a judicial act of the court which it will thereafter recognize as a binding decision." *In re Cox Estate*, 383 Mich 108, 117; 174 NW2d 558 (1970), quoting *Chase v American Cartage Co, Inc,* 176 Wis 235, 238; 186 NW2d 598 (1922) (emphasis in original).

The Supreme Court in *Omelenchuk* undertook to interpret the meaning of § 5856(d) and its relationship to § 2912b – the precise issue we must decide. In order to interpret the statutory meaning, it was necessary to consider and interpret the entire statute – though portions of the statute might not be directly implicated by the facts presented in *Omelenchuk*. Therefore, the Court determined, first, that in certain situations, applicable here, the notice period would not affect the statute of limitations, but that in other situations it would toll the statute. The Court then went on to determine – in those circumstances where the notice period *would* affect the statute of limitations – exactly what affect the notice period would have. The issue regarding the meaning of the first clause of § 5856(d) was therefore germane to the controversy and the Court's resultant conclusion regarding the *nonapplicability* of the tolling provision, is not dicta.

Here, plaintiff's cause of action arose on December 17, 1998. Absent an applicable tolling provision, the two-year limitation period would have expired on December 17, 2000. Plaintiff filed her notice of intent on April 25, 2000, which triggered the 182-day "no filing" notice period. MCL 600.2912b(1). The 182-day period (during which time plaintiff could not file suit) expired on October 24, 2000. As of October 24, 2000, the statute of limitations had fifty-four days to run. Therefore, during the notice period, a claim would not have been barred by the statute of limitations. MCL 600.5856(d). Accordingly, pursuant to *Omelenchuk*, § 5856(d) was inapplicable, the limitation period was not tolled or "extended," and plaintiff was required to file her lawsuit before the expiration of the standard, two-year statute of limitation, December 17, 2000, in order to avoid the two-year time bar. Plaintiff failed to file her lawsuit until January 29, 2001 – after the limitation period had expired. Thus, the trial court correctly ruled that plaintiff's complaint was barred by the statute of limitations.

Plaintiff raises the unpreserved claim that §5856(d) is unconstitutional because its application in this case restricts her right of access to the courts. However, it would be inappropriate for us to consider this issue because the tolling provision is simply inapplicable where plaintiff's notice period ended before the statute of limitations period expired. See *Auto Club Ins Ass'n v City of Farmington Hills*, 220 Mich App 92, 100-101; 559 NW2d 314 (1996).

Plaintiff also contends that the tolling provision of § 5856(d) treats similarly situated medical malpractice plaintiffs differently depending solely on when they file their mandatory notice of intent to file a lawsuit and therefore violates plaintiff's right to equal protection, Const 1963, art 1, § 2. Pursuant to *Omelenchuk, supra*, at 574, the tolling period challenged by plaintiff is inapplicable to her because the 182-day notice/non-suit period of § 2912b(1) ended well before the two-year limitations period expired. Because plaintiff was not precluded from filing her complaint by the interaction of § 2912b and § 5856(d), it is unnecessary to consider her equal protection claim. *Traylor v Auditor General*, 360 Mich 146, 154; 103 NW2d 769 (1960) ("[F]ew principles of judicial interpretation are more firmly grounded than this: a court does not grapple with a constitutional issue except as a last resort").[2]

Affirmed.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder

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[2] Were we to consider plaintiff's equal protection challenge, we would agree with our decision in *Neal* in which we rejected a similar challenge directed at § 2912b. "Under rational-basis review, courts will uphold legislation [if the] legislation is rationally related to a legitimate government purpose." *Crego, supra* at 259, citing *Dandridge v Williams*, 397 US 471, 485; 90 S Ct 1153; 25 L Ed 2d 491 (1970). This Court has identified a legitimate purpose for the notice period (§2912(b)), and has observed that the notice period interacts with the tolling statute (§5856(d) to achieve a legitimate purpose -- the protection of *all* potential medical malpractice claimants from the possible adverse impact of the statute of limitations during the "non-suit" notice period. Therefore, we conclude that, were we to address plaintiff's equal protection argument, the rational basis inquiry is satisfied and § 5856(d) does not violate equal protection.